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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 691

BROTHERHOOD OF RAILROAD TRAINMEN, AFL-CIO,

Petitioner,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on August 18, 1964.

Citation to Opinions Below

The opinion of the Court of Appeals dated August 18, 1964, is printed in Appendix A hereto, infra, and is

reported at 336 F.2d 172.[1] The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed in the Record, pp. 13-19, and the Preliminary Injunction which was appealed by Respondent to the Court of Appeals appears at pp. 19-20 of the Record. Nine copies of the Record as printed for the use of the court below are filed herewith. The District Court's Findings of Fact and Conclusions of Law are also unofficially reported at 55 LRRM 2560.

Jurisdiction

The judgment of the Court of Appeals was entered on August 18, 1964, and is printed in Appendix B hereto, infra. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does a federal district court in order to help a railroad to operate during a strike have the power and the duty to relieve such railroad in whole or in part from the civil and criminal prohibitions of Section 2, Seventh; Section 2, Tenth; and Section 6 of the Railway Labor Act on the basis that such relief is "reasonably necessary" for the railroad to continue to operate during a strike?

2. To what extent, if at all, may a federal district court (or state court of general jurisdiction) release a railroad from the prohibitions of the Railway Labor Act

[1]As reported in the advance sheet at 336 F.2d 172 the opinion erroneously bears the date of May 25, 1964, whereas the correct date of the opinion and judgment is August 18, 1964.

against changing rates of pay, rules or working conditions as embodied in existing labor agreements —

(a) when a railroad is faced with strike conditions and seeks to change rates of pay, rules or working conditions of a craft which is not on strike?

(b) when a railroad is faced with strike conditions and seeks to change rates of pay, rules, or working conditions of a craft which is on strike?

3. Where a railroad which served the November 2, 1959, Section 6 Notice involved in **Brotherhood of Loc. Eng. vs. B. & O. R.R.** (1963), 372 U.S. 284, but which never put such proposals into actual operation or effect prior to passage of Public Law 88-108, 77 Stat. 132, on August 28, 1963, thereafter issued and put into actual effect and operation a new September 25, 1963, Section 6 Notice completely encompassing the prior November 2, 1959, Notice with different and conflicting proposals on all subjects covered by the earlier Notice, and where the later Notice expressly states that when put into effect it would supersede all other rules, agreements and understandings in conflict therewith, does not the railroad's action in placing the second Notice into actual effect supersede and operate to replace the earlier Notice which thus became moot?

4. Where a railroad carrier is enjoined by Congress through Public Law 88-108, 77 Stat. 132, to maintain the status quo ante and to bargain in good faith concerning its pending November 2, 1959, proposals, but instead issues a new Section 6 Notice completely encompassing the pending November 2, 1959, proposals with different,

conflicting proposals, on the same subjects, and actually places such different conflicting proposals into operation and effect, does not the carrier directly violate the Congressional injunction and thereby forfeit the right thereafter to effectuate the November 2, 1959, proposals?

5. Where the Congressional injunction contained in Public Law 88-108 was reiterated and reenforced by a subsequent judicial injunction obtained by the United States specifically against respondent, does not the respondent's continued and willful violation of both injunctions operate to forfeit the railroad's right to effectuate its November 2, 1959, proposals?

6. Did not the Court of Appeals rule in conflict with its own decision and the decisions of other courts of appeal on the same matter in making a final determination on the merits of the railroad's right to effectuate its November 2, 1959, proposals as to the crafts represented by petitioner where the Court of Appeals was reviewing only a preliminary injunction involving complicated factual and legal issues presenting serious and substantial questions?

Statutes Involved

1. **The Railway Labor Act**, 45 U.S.C. 151-163. The applicable texts of Section 2, First (45 U.S.C. 152, First); Section 2, Seventh (45 U.S.C. 152, Seventh); Section 2, Tenth (45 U.S.C. 152, Tenth); Section 5, First (45 U.S.C. 155, First); Section 5, Third (e) (45 U.S.C. 155, Third (e)); Section 6 (45 U.S.C. 156); and Section 10 (45 U.S.C. 160) of the Railway Labor Act, being lengthy, are set

forth in Appendix D hereto, infra. The provisions of Section 2, Seventh, and Section 6 are also set forth herein as follows:

Section 2, Seventh, Railway Labor Act, 45 U.S.C. 152, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6, Railway Labor Act, 45 U.S.C. 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section

155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

2. **Public Law 88-108**, August 28, 1963, 77 Stat. 132. The text of Public Law 88-108, being lengthy, is set forth in Appendix C hereto, infra. Pertinent provisions thereof are also set forth herein as follows:

"* * * Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organizations notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

"* * * * *

"Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all

issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement."

Statement of the Case

This case involves the longest strike in the history of the American railroad industry. The dispute is a stubborn, bitter one which has resisted all efforts of the federal government (or anyone else) to resolve. The economic and other consequences on the State of Florida and on the lives of all persons affected are awesome, tragic, and incalculable. A brief history of the dispute is necessary to place the proceedings in the courts below in context.

On January 23, 1963, the non-operating employees of the FEC[2] engaged in a legal strike over proposed changes in rates of pay and working conditions for the various non-operating crafts. Admittedly all procedures of the Railway Labor Act were exhausted and the parties free to take self-help. Most of the non-striking operating employees refused to cross the picket lines, and the FEC ceased operations (R. 138, 145).[3] The BRT is not

[2]For the sake of brevity, respondent will be referred to herein as FEC and petitioner as BRT.

[3]"Non-operating" crafts refers to crafts that do not actually operate trains, e.g., telegraphers and clerks, while "operating" crafts refers to workers who actually run the trains, e.g., engineers, and trainmen.

and has never been a party to the non-operating crafts' dispute, does not participate in negotiations concerning it, and can neither settle nor prolong such dispute.

The FEC resumed operations eleven days after the strike began (R. 39), and at least by October, 1963, had substantially achieved full car-load freight service. At the time of trial, the FEC was handling approximately 95% of car-load freight traffic handled in comparable pre-strike periods (R. 44, 47-48).[4]

At first the FEC resumed operations using only supervisory personnel. Gradually, however, it was able to recruit a work-force of replacements or returning employees, and on October 1, 1963, the FEC's then vice-president Thornton (now president) testified before the Joint Federal Inquiry Board at Cape Kennedy (then Cape Canaveral) that, "We have as of this time, in excess of 650 employees on the railroad whom we have recruited or who have actually returned to work since the work stoppage." He added, "I think we are approaching the point now where we are almost up to the full manpower requirements."

The employees who returned to work or were recruited were not employed, however, under rates of pay, rules, or working conditions as embodied in existing contracts. In the crafts represented by BRT, the replacements instead were required to agree individually to work on terms unilaterally prescribed by the FEC which differed radically from the existing contract (e.g., to work a six-day week instead of a five-day week, R. 134). Such terms were

[4]The FEC has never resumed its less-profitable less-than-car-load freight service or passenger service.

codified by the FEC on September 1, 1963, in a document entitled "Conditions of Employment" for which each employee was required to sign a receipt and which were stated to apply for the duration of the strike (R. 131). Suffice it to say that the "Conditions of Employment" reduced pay, increased hours, and radically favored the employer.

On September 25, 1963, the FEC embodied the "Conditions of Employment" in a Section 6 Notice which it duly served on the BRT and other craft representatives and since that time the parties have engaged in "bargaining" as to whether the FEC should do what it had already done in fact since February 3, 1963.

At all times up to the trial of this case on February 28, 1964, and to the last trial court hearing on March 7, 1964, the FEC as to the crafts represented by the BRT has been operating under rates of pay, rules and working conditions unilaterally imposed by the FEC without pretense of compliance with the Railway Labor Act and which are the subject of the pending September 25, 1963, Section 6 Notice being "negotiated."

In addition to the pending September 25, 1963, Notice proposals, the FEC also on July 31, 1963, issued a new Section 6 Notice proposing to abolish the union shop provision of the existing contract with the BRT. Although the jurisdiction of the National Mediation Board was properly invoked by the BRT concerning this Notice, and the matter is still pending before the National Mediation Board as NMB Case #A-7026, the FEC on September 9, 1963, formally notified the BRT it was putting the July 31, 1963, Notice abolishing the union shop agreement into

effect, and in fact has not complied with the union shop agreement since February 3, 1963.

In regard to the November 2, 1959, Notice proposals, the FEC followed the same conduct as the other Class I railroads in the Southeastern Carriers Conference Committee until this Court's decision in **Brotherhood of Loc. Eng. vs. B. & O. R.R.** (1963), 372 U.S. 284, was rendered on March 4, 1963. Thereafter the FEC embarked on a strange, unilateral course of its own. On March 12, 1963, the FEC withdrew from the Southeastern Carriers Conference Committee, and on April 2 advised the BRT that it proposed to make the 1959 proposals effective on April 3. On April 3, President Kennedy created Emergency Board No. 154 under Section 10 of the Railway Labor Act. The FEC refused to withdraw its notice of implementation, although in fact it had not actually put the 1959 proposals into effect and instead was operating under the drastically more different conditions later embodied in the codification entitled "Conditions of Employment" and the September 25, 1963, Section 6 Notice. Taking FEC's paper implementation notice at face value, the United States brought suit to compel compliance by FEC with the provisions of Section 10 of the Railway Labor Act, and on May 7, 1963, an injunction was issued requiring the FEC to withdraw its implementation notice in **United States vs. Florida East Coast Ry.** (D.D.C., 1963), 221 F.Supp. 325. The FEC made no change in its actual working conditions in response to the injunction issued in that case, and the injunction had no effect on actual operations. Thereafter, the injunction and status quo provisions of Section 10 of the Act expired, and the FEC again on July 8, 1963, formally notified the BRT that it was implementing the November 2, 1959, Notice proposals on July 10, 1963.

Again this was merely a paper notification, and no actual change in rates of pay, rules, of working conditions was made on July 10.

On August 28, 1963, Public Law 88-108 was approved and the FEC, along with all other carriers that had served the November 2, 1959, Notice proposals was enjoined to restore the status quo ante, i.e., pre-1959-Notice status quo, and to bargain in good faith with the unions concerning such 1959 proposals until February 24, 1964. In purported obedience to this injunction, the FEC again withdrew its paper notification of implementation of the 1959 proposals. But at the same time it also codified the existing working conditions in written form by publishing its "Conditions of Employment" on September 1, 1963, which it required all employees to sign for and individually agree to. Shortly thereafter, on September 25, 1963, it embodied the "Conditions of Employment" in a formal Section 6 Notice of that date. And all during this time it continued without any change whatsoever the rates of pay, rules, and working conditions imposed unilaterally since February 3, 1963, i.e., the ones set forth in its September 25, 1963, Notice.

The United States again brought suit against the FEC, this time to enforce the status quo ante provisions of Public Law 88-108. The case came on for trial in December in Jacksonville in the U. S. District Court for the Middle District of Florida. FEC's vice-president testified that if enjoined by the Court, the FEC would revert to the last "duly negotiated contracts" in compliance with such injunction. The Court issued its injunction orally from the bench on December 12, 1963, but did not enter a written order until March 2, 1964 (at which time a

nunc pro tunc injunction to the date of the oral order, December 12, 1963, was issued). **United States vs. Florida East Coast Ry.** (M.D. Fla. 1964), __ F. Supp. __, 55 LRRM 2798. However, again the injunction had no effect whatsoever on the conduct of the FEC, and no change from the "Conditions of Employment" or September 25, 1963, Notice proposals, then in actual effect, was made by the FEC. The FEC continued to operate despite the injunctions just as it had since February 3, 1963.

At all times since February 3, 1963, the replacements and returning workers employed by the FEC in the crafts of trainmen and yardmen represented by the BRT have been worked under rates of pay, rules and working conditions which drastically differ from the existing BRT collective bargaining contract, regardless of whether such contract be deemed amended by the November 2, 1959, Notice proposals or not. In short, the November 2, 1959, Notice proposals were never put into actual effect or operation. And the rates of pay, rules and working conditions actually in effect are the same as those "proposed" in the September 25, 1963, Notice which expressly stated (as drafted by the FEC) that when placed in effect it would supersede all rules, agreements and understandings in conflict therewith (R. 74-75).

This action was commenced by the BRT on February 24, 1964, in the U.S. District Court for the Middle District of Florida, Jacksonville Division. The complaint set forth the wholesale changes in rates of pay, rules and working conditions made by FEC; alleged that all such changes were in violation of the Railway Labor Act; and sought a temporary and permanent injunction restraining the FEC from making such changes except in compliance with

the procedures of the Railway Labor Act. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1331; 28 U.S.C. 1337; and the Federal Declaratory Judgment Act, 28 U.S.C. 2201.

The application for a preliminary injunction came on for hearing before Chief Judge Bryan Simpson on February 28, at which time testimony and evidence were presented by both parties. By order of March 2, 1964, the Court granted a preliminary injunction restraining the FEC from instituting changes in rates of pay, rules or working conditions except in compliance with the procedures of the Railway Labor Act; prohibiting the FEC from instituting the changes proposed in its pending Section 6 Notices of July 31, 1963, and September 25, 1963; prohibiting the FEC from instituting the changes proposed in the November 2, 1959, Notice or the finding that such proposals had been superseded by the railroad's later September 25, 1963, Notice under which the railroad was actually operating; and ordering the FEC to reinstate and maintain the rates of pay, rules and working conditions contained in the last duly negotiated contract with the BRT until the procedures of the Railway Labor Act were completed or until further order of the Court (R. 19-20). Motion for Reconsideration or Modification was heard March 7, 1964, and denied by Order dated March 9 (R. 20-23, 57).

Appeal followed, and on March 14, 1964, the Court of Appeals for the Fifth Circuit issued its order staying the District Court's preliminary injunction pending appeal. Following such stay order, the United States entered its appearance as amicus curiae urging affirmance of the injunction on the ground that the public interest requires

a party to a railroad dispute to follow the mandatory procedures of the Railway Labor Act before resorting to self-help.[5]

Oral argument on the appeal was held May 25, 1964, and on August 18, 1964, the opinion and judgment here sought to be reviewed were issued. The Court of Appeals affirmed in part and reversed in part. It affirmed the preliminary injunction insofar as it prohibited the FEC from implementing its pending July 31, 1963, Notice and its September 25, 1963, Notice or making other wholesale changes without compliance with the Railway Labor Act. It reversed insofar as the injunction restrained implementation of the November 2, 1959, Notice, holding flatly on the merits that the November 2, 1959, Notice was not superseded by the later September 25, 1963, Notice. And the Court of Appeals further ruled that on remand it was the duty of the District Court on proper showing therefor to "authorize" the FEC to make changes in rules and working conditions as embodied in BRT agreements without complying with the Railway Labor Act's mandatory procedures where such changes are "reasonably necessary" to make "a meaningful reality of FEC's right to continue to operate" during the non-operating employees' strike.

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[5]The position of the United States as amicus curiae supported the position of petitioner BRT in the Court of Appeals in all respects except in regard to the portion of the injunction concerning supersession of the November 2, 1959, Notice proposals by the later September 25, 1963, Notice proposals actually put into effect by the FEC. The United States took no position upon this issue on the ground that it did not involve the public interest in the same way as does FEC'S asserted right to by-pass the mandatory procedures of the Railway Labor Act.

Argument
and
Reasons For Allowance Of The Writ

Petitioner relies upon the following reasons why the petition for writ of certiorari should be granted in this case:

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Ever since the 1870's Congress has been vitally concerned with the matter of labor disputes in the Nation's railroad industry. Recognizing the dire consequences that the public as well as the parties suffer when labor-management relations break down in this key area of our economy, Congress has repeatedly struggled with the problem of providing a fair method of settling such disputes consistent with freedom and our traditions. Perhaps no other subject has come before the Congress so repeatedly and so persistently over so long a period. Public Law 88-108, approved August 28, 1963, is the latest example. The first legislation, providing for voluntary arbitration and public investigations, was passed in 1888. 25 Stat. 501. Between those dates, Congress applied its attention to the problem repeatedly—in the Erdman Act of 1898, 30 Stat. 424; the Newlands Act of 1913, 38 Stat. 103; Title III of the Transportation Act of 1920, 41 Stat. 469; and then the Railway Labor Act of 1926, 44 Stat. 577, thereafter amended in 1934, 48 Stat. 1186, in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238. Hardly a decade has elapsed without the need for Congressional attention.

Clearly the problem itself is one of paramount national importance.

In this litigation, involving the longest strike in railroad history, the Court of Appeals for the Fifth Circuit has judicially created a major exception to the clear, plain, mandatory provisions of the Railway Labor Act. It has done this without reference to either the language of the statute itself or to its extensive legislative history so ably presented to it in the Government's amicus curiae brief. No other court of appeals, or state or lower court for that matter, has ever discovered this exception before during the 38 years the Railway Labor Act has been on the books. Petitioner respectfully submits that review by this Court is essential in order to preserve the integrity of the Act and to insure that the Congressional purposes embodied in the Act are achieved. Even if it is determined that the exception so lately enunciated does in fact exist, review by this Court is necessary in order to define it more clearly and settle how it shall be judicially administered uniformly throughout the Nation.

The Court of Appeals held in this case that a railroad, when faced with strike conditions, may apply to a U. S. District Court for leave to change rates of pay, rules, and working conditions of a craft not itself on strike despite and regardless of the specific prohibitions of the Railway Labor Act which are enforceable by both civil and criminal sanctions. In short, the Court of Appeals held that the District Court is empowered to license a railroad to ignore the statute where the railroad makes a sufficient showing that exemption from the Act is "reasonably necessary" for it to operate under strike conditions.

While the Court of Appeals does not define this exception more fully, or the procedures for its invocation, apparently it is not just the U. S. District Court for the Middle District of Florida which enjoys this power to authorize exemption from the Railway Labor Act. District court judges throughout the country, as well as all state court judges of courts of general jurisdiction, presumably may exercise their discretion from "the locomotive cab" (336 F.2d at p. 182) to decide whether it is reasonably necessary for the railroad to be relieved of its Railway Labor Act duties in order "to make a meaningful reality" (336 F.2d at p. 182) of the railroad's right to operate under strike conditions. It is neither idle nor speculative to suggest that the mere threat of strike action on any railroad system in the Nation will produce the greatest court-shopping expedition since **Swift vs. Tyson** (1842), 16 Pet. 1, 10 L.Ed. 865, was overruled. See **Erie R. Co. vs. Tompkins** (1938), 304 U.S. 64 at 74-75. Uniform judicial administration of the Railway Labor Act will become an impossibility. Courts will become active protagonists in railway labor disputes. If strike conditions become too onerous, there will always be a more palatable alternative to settling the strike—apply to the courts for exemption from the criminal and civil prohibitions of the Railway Labor Act. If successful, the strike then need never end, and the longer it lasts the more benefit accrues to the railroad.

The doctrine enunciated by the Court of Appeals may have even wider implications. If strike conditions warrant judicial exculpation from the burdens of the Railway Labor Act, why not also from those of the Federal Employers' Liability Act, 45 U.S.C. 51-60, the Safety Appliance Act, 45 U.S.C. 1-16, 15 U.S.C. 77c, 49 U.S.C. 26-27, and

any other federal statute the suspension of which may be reasonably necessary to make a meaningful reality of the railroad's inalienable right to operate under strike conditions?

In summary, petitioner suggests that the ruling of the Court of Appeals below is both novel and of tremendous significance to the stability of harmonious labor-management relations in the railroad industry. Even if confined to the boundaries of the Fifth Circuit alone, an area extending from El Paso to Key West, the effect upon the Nation's transportation systems and economy will be profound and, we respectfully submit, disastrous. This Court should review such a decision.

2. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Unlike the National Labor Relations Act, 29 U.S.C. 141 et seq., the Railway Labor Act provides sharp "teeth" for violation of its prohibitions. Section 2, Tenth (45 U.S.C. 152, Tenth) of the Act provides as follows:

> "Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, *seventh*, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, *and each day during which such*

carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. * * *" (emphasis added)

Clearly Congress intended its mandatory procedures to be obeyed. Yet one of the very sections which Congress selected to enforce with criminal sanctions, Section 2, Seventh,[6] is the section which the Court of Appeals has ruled may be suspended, in whole or part, by judicial decree upon a showing of reasonable necessity of the railroad to continue operations under adverse economic circumstances.

Petitioner knows of no other holding by this Court, by any court of appeals, or state appellate court that permits a person to apply to a court of law for permission to violate a criminal statute on the basis of economic necessity. Such a radical doctrine surely deserves review by this Court, if not by both this Court and Congress too. And if such a doctrine is to be developed, it is more than passing strange that the first applicant for relief should be a multi-million-dollar railroad owned and operated by the largest financial colossus in the State of Florida, the duPont Estate. What other criminal laws may likewise be suspended to make a "meaningful reality" of the railroad's right to operate? Is Labor equally free when the going gets tough to apply for exemption from criminal laws that impede its cherished right to strike so as to make such right more meaningful? The Court of Appeals

[6]Section 2, Seventh, provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 [Section 6] of this title." 45 U.S.C. 152, Seventh. None of the existing agreements involved in this case permits changes in rates of pay, rules, or working conditions in any manner other than in compliance with the Railway Labor Act.

left these questions unanswered, but its decision requires that they be answered lest hope of settlement of the current dispute completely vanish. This Court should review the decision rendered below that economic necessity may warrant judicial suspension of a criminal statute.

3. The Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter.

The only action of the District Court which was before the Court of Appeals below for review was a preliminary injunction issued at the outset of a law suit. It is true that in labor controversies, preliminary injunctions have a way of cutting to the merits and ending the entire controversy. But the principle still remains that on appellate review of a preliminary injunction the scope of review is a limited one which does not reach to the intrinsic merits of the case as such. Thus, in a similar case to the instant one, where a preliminary injunction had been issued against a railroad to preserve the status quo ante while the case was tried, the Court of Appeals for the Third Circuit in **Railroad Yardmasters vs. Pennsylvania R.R. Co.** (3rd Cir. 1955), 224 F.2d 226, 229, held:

> "We are now reviewing the propriety of the issuance of a preliminary injunction. At this stage, we are concerned only to find out if the Union 'has * * * raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.' Hamilton Watch Co. v. Benrus Watch, supra at p. 740. [206 F.2d 738] Where, as here the harm to the

> Railroad from the injunction can be adequately measured in dollars, while the harm to the Union if the injunction is refused is irreparable, the raising of the substantial and serious doubts is at least sufficient to justify the issuance of a temporary injunction."

The Fifth Circuit, in other cases, has recognized and applied this rule. In **Wooten vs. Ohler** (5th Cir. 1962), 303 F.2d 759, 761-762, which also involved a labor dispute, the Court held:

> "At the outset, and as done so many times recently, we find it appropriate to emphasize the limited scope of review of a preliminary injunction. [case citations omitted] The Sheriff asks us to agree with him that the trial Judge was wrong. But that is not precisely the issue before us. The granting or denying of a preliminary injunction is within the discretion of the trial Judge, 'in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.' Yakus v. United States, 1944, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834. Consequently, we do not review the intrinsic merits of the case as such. Rather, our inquiry is whether there has been an abuse of discretion. Our review of the probable merits does not go to whether we would ultimately hold that the trial Judge was right or wrong, but only to the ascertainment of whether his action was within his broad range of discretion." 303 F.2d at 761-762.

See also **Flight Engineers' Inter. Ass'n. vs. American Airlines, Inc.** (5th Cir. 1962), 303 F.2d 5, 13.

In the instant case petitioner respectfully suggests the principle described above was conspicuously honored by its breach rather than by observance insofar as the status of the November 2, 1959, Notice proposals are concerned. The evidence and law presented to the District Court on this issue showed conclusively that the FEC in regard to the 1959 proposals completely ignored the mandatory provision of Section 10, 45 U.S.C. 160, of the Railway Labor Act that the status quo be preserved after creation of Emergency Board No. 154 by President Kennedy on April 3, 1963, and for thirty days after rendition of its report on May 13, 1963. Instead the Railroad instituted or continued unilateral changes on a wholesale basis even more radical in their nature than the 1959 proposals. The United States brought suit and on May 7, 1963, Judge Youngdahl issued an injunction in **United States vs. Florida East Coast Ry.** (D.D.C. 1963), 221 F. Supp. 325, requiring observance of the status quo requirements. But the Railroad made no change back from the new, unilateral working conditions in actual effect, and the injunction and Section 10 "waiting period" expired. Thereafter, Public Law 88-108 became law on August 28, 1963. Its provisions again enjoined the FEC to restore the status quo ante. Instead the FEC on September 1 codified and published its radically different, wholesale changes and required all employees in BRT and other crafts to sign therefor. Several weeks later it embodied these new changes in its Section 6, Notice of September 25, 1963, and expressly stated that, when effective, such changes would supersede all other rules, agreements and understandings in conflict therewith.

Of course such changes, having already been put into operation, were "effective" in any real sense of the word immediately. Again the United States brought suit, this time in the U. S. District Court in Jacksonville, and again an injunction was issued on December 12, 1963, from the bench requiring the Railroad to obey Public Law 88-108. **United States vs. Florida East Coast Ry.**, Civil Case No. 63-260, — F. Supp. —, 55 LRRM 2798. But for all the effect such court action had on the FEC the injunction might as well have been spoken in Sanskrit. No change whatsoever was made in the actual rates of pay, rules, or working conditions being enforced by the FEC on its system. And at least up until March 7, 1964, the date of the last hearing in the trial Court below, the FEC persisted as it had since February 3, 1963, in operating under a completely different set of rules, working conditions and rates of pay—different from the duly negotiated contract with the FEC and different from the 1959 proposals.

In short, and in summary, the FEC flagrantly and totally frustrated the status quo provisions of the Railway Labor Act and of Public Law 88-108. It did this in defiance both of Congress and the federal courts. The effect of such lawlessness on the Railroad's right thereafter to implement the 1959 Notices raises at the very least doubtful and difficult questions of law and fact. And certainly Chief Judge Simpson, a jurist with years of experience on both the state and federal bench, was acting "within his broad range of discretion" (**Wooten vs. Ohler** (5th Cir. 1962), 303 F.2d 759, 762) in requiring the FEC to preserve in fact and in reality and at last the status quo ante pending further proceedings. As the Court of Appeals stated in its opinion below, "Bargain-

ing is a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a §6 notice." 336 F.2d at 180. To hold that the FEC, after it had reduced bargaining on the 1959 proposals to a sham, was free to implement those proposals, is to reward defiance of law and order and to make the Department of Justice that instituted, and the federal courts that heard, the two suits brought by the United States against the FEC foolish participants in exercises of total futility. This Court should grant review of the judgment below which flatly holds that the FEC is free to operate under the duly negotiated 1949 BRT contract "as amended by the November 2, 1959, notice." 336 F.2d at 182.

Conclusion

Petitioner earnestly prays that this Court grant this petition for a writ of certiorari to review the judgment and opinion below. If such decision is to stand as the law governing this unending, tragic labor controversy, with all its human losses, then only an Act of God or an Act of Congress remain to be hoped for to restore reason and harmonious relations to the premises.

Respectfully submitted,

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Certificate of Service

I Hereby Certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 13th day of November, 1954, upon William B. Devaney, Esquire, Steptoe & Johnson, 1100 Shoreham Building, Washington 5, D. C., and upon Chester Bedell, Esquire, and Nathan Bedell, Esquire, Bedell, Bedell & Dittmar, 1520 Barnett National Bank Building, Jacksonville 2, Florida, by depositing a copy of same addressed to each in the United States mail with sufficient air mail postage, prepaid.

NEAL RUTLEDGE

Neal Rutledge

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21356

FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,

Appellant,

versus

BROTHERHOOD OF RAILROAD TRAINMEN,
AFL-CIO,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(August 18, 1964.)

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge.

BROWN, Circuit Judge: Florida East Coast appeals from the grant of a preliminary injunction[1] which restrains it from operating under working conditions dif-

[1]The injunction was stayed by this Court on March 17, 1964, after argument of counsel and exchange of briefs.

ferent from those contained in its agreement with the Brotherhood of Railroad Trainmen, the bargaining representative of FEC's employees in the crafts of trainmen and yardmen.[2] The primary question presented is to what extent, if at all, is a Carrier faced with strike conditions free to institute changes affecting rates of pay, rules, or working conditions without complying with the procedures provided in §6 of the Railway Labor Act?[3]

The unusual importance of the facts giving rise to this controversy requires that we state them in some detail.

The November 2, 1959 Notice

On November 2, 1959, FEC, along with the other 200-odd Class I Carriers in the United States, issued two notices pursuant to §6 to its operating organizations, including BRT. One related to "Consist of Crews," the other, to "Basis of Pay and Assignment of Employees." Conferences between individual carriers and the operating organizations failed to produce agreement, and negotiations on a national level were begun.[4] The national negotiations of the November 2, 1959 notice likewise did not produce agreement, and in October of 1960, the Organiza-

[2]These are so-called "operating crafts"; that is, the crafts of employees whose work involves the actual operations of the trains.

[3]45 USCA §156.

[4]The FEC executed a power of attorney to the Southeastern Carriers Conference Committee for the purposes of representation in the joint national negotiations.

tions[5] and the Carriers agreed to the creation of a Presidential Railroad Commission which was to investigate and report on the controversy, using its "best efforts, by mediation, to bring about an amicable settlement * * *."[6] On February 28, 1962, the report of the Commission[7] was delivered to the President. National conferences on the remaining unsettled issues resumed on April 2, 1962, and continued through May 17. These conferences did not result in agreement, and on May 21 the Organizations applied for the mediation services of the National Mediation Board pursuant to §5 of the Act. After numerous meetings[8] had been held under the auspices of the Board without agreement being reached, the Board on July 16, 1962, terminated its services.[9] The Carriers then served notice that they intended to put the November 2, 1959, notice into effect,[10] and the Organizations and Carriers

[5]In addition to the BRT, the labor organizations representing operating crafts which were engaged in the national negotiations were Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, and Switchmen's Union of North America.

[6]Brotherhood of Loc. Eng. v. B. & O. R.R., 1963, 372 U.S. 284, 286, 83 S.Ct. 691, 9 L.Ed.2d 759. This case contains much background information regarding the national handling of the November 2, 1959 notice, and has been freely relied upon to place the events of record in proper context.

[7]The Commission was created by Executive Order 10891 in November 1960, and its members were appointed in December of that year. The parties had agreed that the proceedings of the Commission were to be accepted "as in lieu of the mediation and emergency board procedures provided by * * * §§5 and 10 of the Act.

[8]Between May 25 and June 22, approximately 32 meetings were held.

[9]The Organizations refused to submit the dispute to arbitration.

[10]The first notice was actually issued on July 17. The Organizations filed suit alleging that the rule changes encompassed by the July 17 notice of intent would violate the Act. Subsequently, with leave of Court and without objection by the Organizations, the Carriers withdrew the July 17 notice and substituted therefor the November 2, 1959 notices, the changes to become effective on August 16.

began the litigation which was to culminate in the Supreme Court holding that the statutory procedures having been exhausted, the November 2, 1959, notices could be put in effect subject only to the invocation of a §10 Emergency Board. *Brotherhood of Loc. Eng. v. B. & O.R.R.*, 1963, 372 U.S. 284, 83 S.Ct. 691, 9 L.Ed.2d 759.

While the *B. & O.* case was making its tortuous way to the Supreme Court, things were happening back at the FEC yard. On January 23, 1963, 11 cooperating, non-operating labor organizations[11] representing certain FEC employees went out on strike over a wage demand as to which all parties concede the procedures of §6 had been exhausted. The BRT did not issue a strike notice, but its members honored the picket lines of the non-operating organizations and consequently did not report for work. Eleven days later, on February 3, 1963, FEC resumed operations by utilizing supervisory personnel and some replacement workers. It is uncontradicted on this record that replacements utilized in the trainmen and yardmen crafts were worked under conditions which differed from

[11]The organizations are International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers International Association; International Brotherhood of Electrical Workers; Brotherhood of Railway Carmen of America; International Brotherhood of Firemen and Oilers; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Maintenance of Way Employees; The Order of Railroad Telegraphers; Brotherhood of Railroad Signalmen; and Hotel and Restaurant Employees and Bartenders.

those provided by the collective bargaining agreement then in effect between FEC and the BRT.[12]

Then on March 4, 1963, the *B. & O.* decision came down, and on March 12, 1963, the FEC withdrew authority from the Southeastern Carriers Conference Committee to negotiate for it the November 2, 1959, notice. The formal mandate of the Supreme Court in the *B. & O.* case was received in the District Court in Illinois on April 2, 1963, and on that day the National Railway Labor Conference sent a telegram to the National Mediation Board advising that the District Court upon receipt of the mandate had dissolved the injunction restraining the Carriers from making the November 2, 1959, changes effective, and that the Carriers proposed to make them effective on April 8. On the same day, April 2, FEC advised its operating Organizations including BRT that it proposed to make the November 2, 1959, notices effective on April 3. Likewise on April 2, the Mediation Board certified by letter to the President the existence of an emergency and recommended the appointment of an Emergency Board under §10. On April 3, Emergency Board No. 154 was created.

Meanwhile, apparently on receipt of FEC's April 2 letter, the BRT issued a strike notice effective April 5. This occasioned no change in FEC's operations since FEC had been struck by the non-operating crafts since Jan-

[12]The exact terms of employment of the replacement workers need not here be detailed. It suffices to say here that the conditions under which they worked from February 3, 1963, also differed from the conditions as set out in the November 2, 1959, notice but were substantially identical to those formally reduced to writing on September 1, 1963, which are discussed infra.

uary 23, 1963, and during all this time the BRT had honored the picket lines. However, the United States was convinced that FEC could not place the notice into effect until the Emergency Board had finished its investigation of the dispute and the 30-day waiting period provided in §10 had exxpired.[13] The United States was successful on May 7, 1963, in obtaining an injunction to that effect. *United States v. Florida East Coast Ry.*, D.D.C., 1963, 221 F.Supp. 325.[14] Emergency Board No. 154 reported on May 13, 1963, and the 30-day waiting period subsequently expired. The FEC and the other Carriers were then free for the first time to put the November 2, 1959, notices into effect.

That is precisely what FEC did. On July 8, 1963, it issued a formal notice to the operating Organizations, including BRT, that on July 10, 1963, the November 2, 1959 notices would be put into effect. The BRT again issued a formal strike notice,[15] but—as in April—this did not change the operating situation since the BRT was still refusing to cross the picket lines of the non-operating crafts who were still out on strike. Consequently, the November 2, 1959, notice was formally[16] in effect as of July 10, 1963.

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[13]This would put the FEC on a par with other Carriers which participated in the national handling of the dispute.

[14]The injunction was conditioned upon FEC's being allowed to participate fully in the proceedings before the Emergency Board.

[15]The BRT had voluntarily withdrawn the April strike notice upon the issuance of the injunction in United States v. Florida East Coast Ry., D.D.C., 1963, 221 F. Supp. 325.

[16]The word "formally" is used repeatedly for one simple reason. The FEC has never operated under the November 2, 1959, rules. At all times pertinent to this suit subsequent to January 23, 1963, the FEC has operated under conditions which differ from both the collective bargaining agreement as it existed prior to November 2, 1959, and the agreement as it would be constituted after amendment by the November 2, 1959 notice.

Then on August 23, 1963, Congress passed Public Law 88-108,[17] which among other things prohibited Carriers which had served the November 2, 1959, notice from unilaterally making changes in "rates of pay, rules, or working conditions encompassed by * * * such" notice and ordered that action of the sort prohibited which had already been taken be rescinded, and "the status existing immediately prior to such action restored." It further provided that two of the issues encompassed by the November 2, 1959 notice were submitted to binding arbitration[18] and set up the procedure for accomplishing that arbitration. In response to the request of Secretary of Labor Wirtz, the FEC withdrew November 2, 1959, rules which it had formally put into effect on July 10, for the life of Public Law 88-108. When 88-108 expired by its own terms on February 24, 1964, four days before the hearing in the District Court which resulted in the March 2, 1964, preliminary injunction appealed from, the FEC again placed the November 2, 1959, notice formally into effect.[19] This brings us to date with respect to the November 2, 1959, notice. But meanwhile, other things were happening.

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[17]Act of August 23, 1963, 77 Stat. 129.

[18]The portions submitted to binding arbitration were those identified as "use of Firemen (Helpers) on Other Than Steam Power," "Consist of Road and Yard Crews," and certain portions of the Organizations' September 7, 1960, notice relating to the same subject matter. These matters have been settled by agreement of the FEC and its operating Organizations and are not here involved.

[19]The notice letter to BRT of February 24, 1964, stated that the 1959 notice would be placed into effect at 12.01 a.m., Tuesday, February 25, 1964. As indicated previously, other settlements had been made of the "Firemen" and "Crew Consist" issues (see note 18, supra), and these portions of the November 2, 1959, notice were excepted from the terms of the letter.

The Union Shop Notice

On July 31, 1963, the FEC issued a new §6 notice to the BRT that it proposed to cancel the union shop provision of the collective bargaining agreement. Representatives of the FEC and BRT assembled at the Monson Hotel in St. Augustine, Florida, on August 29, 1963, but the conference never began. The FEC insisted on having a Court Reporter present to record the meeting, and the BRT refused to negotiate under such circumstances. Consequently, on September 4, the BRT requested the services of the National Mediation Board. The Board accepted the case, and it was docketed the same day as NMB A-7026. On September 9, the FEC received a letter from the National Mediation Board informing that the matter had been docketed. However, earlier that same day (September 9, 1963), the FEC had written the BRT to say that the conference having been ineffectual and the services of the Mediation Board not having (to its knowledge) been invoked, it was putting the July 31, 1963, notice abolishing the Union Shop into effect. The Union Shop portion of the collective bargaining agreement has not been honored since that date although the matter still pends before the Mediation Board.

The September 25, 1963 Notice

As we indicate in the preceding statement, the FEC has operated since February 3, 1963, under conditions of employment that differ from both the pre-1959 collective bargaining agreement and the agreement as it would be amended by the November 2, 1959, notice. Those ac-

tual operating conditions were formally reduced to writing on September 1, 1963, and all employees hired to work in the trainmen and yardmen crafts since that date have been required to sign a copy of this formal promulgation called by FEC "Conditions of Employment." Then on September 25, 1963, the FEC served a §6 notice which proposes to amend the collective bargaining agreement to provide rates of pay, rules, and working conditions which all concede are substantially identical to those embodied formally in the "Conditions of Employment" and followed in actual practice since February 3, 1963. On October 30, 1963, the FEC resumed conferences on the November 2, 1959, and the September 25, 1963, notices, discussing the November 2, 1959, notice first. On November 1, 1963, the discussion of the September 25, 1963, notice continued. The parties were still discussing this notice on February 28, 1964, the date of the hearing on BRT's motion for preliminary injunction.

The position of the BRT and the United States as *amicus curiae*, simply stated, is that the FEC has instituted changes in rates of pay, rules, and working conditions without following procedures made mandatory by the Act. They further urge that the injunction was necessary in order to prevent a subversion of the statutory procedures.

The FEC, on the other hand, contends that the complaint of the BRT is that the bargaining agreement is not being complied with. Such complaints, it urges, are "minor disputes" within the exclusive jurisdiction of the Railroad

Adjustment Board. It further asserts that whatever the nature of the dispute, major or minor, it is justified by "strike conditions" in operating under the working conditions it has imposed. This is true, it says, despite the fact that the conditions are different from both the pre-1959 agreement and the agreement as it would be constituted after amendment by the November 2, 1959, notice. And, the argument continues, this is so even though the working conditions are substantially identical with the proposal of September 25, 1963, which is presently being discussed by it and the BRT because these are "temporary conditions imposed by strike" and not permanent prospective changes of the "agreement."

First, we think that this is clearly a so-called "major dispute" within the meaning of the decisions of the Supreme Court and this Court. *Elgin, Joliet & Eastern Ry. v. Burley*, 1945, 325 U.S. 711, 723-25, 65 S.Ct. 1282, 89 L.Ed. 1886; *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 1960, 362 U.S. 330, 341, 80 S.Ct. 761, 4 L.Ed. 2d 774; *Missouri-Kansas-Texas R.R. v. Brotherhood of Locomotive Engineers*, 5 Cir., 1955, 266 F.2d 335; *St. Louis, San Francisco & T. Ry. v. Railroad Yardmasters of America*, 5 Cir., 1964, 328 F.2d 749; *Aaxico Airlines, Inc. v. Air Lines Pilots Ass'n International*, 5 Cir., 1964, 331 F.2d 433. This is not a case like *Missouri-Kansas-Texas, Frisco*, or *Aaxico* involving a dispute as to whether the agreement authorizes action taken by the Carrier. Neither is it a case involving a dispute over the meaning of the terms relating to rates of pay, hours, and working conditions. Rather, this is a case in which a Carrier has

unilaterally instituted wholesale changes in these terms, changes which, in the negotiations presently going on with respect to the September 25 notice, it seeks to establish permanently. The bulk of the changes were instituted on February 3, 1963, with no pretense at compliance with the Act. Although FEC did serve the July 31, 1963, notice of intent to cancel the Union Shop agreement, the cancellation was formally effected on September 9, 1963, while the matter was pending before the National Mediation Board.[20] Employees hired after September 1, 1963, were made to sign the "Conditions of Employment" which formally reduced to writing the changes of February 3, 1963. Again, this was done with no pretense of compliance with the Act. Finally on September 25, 1963, the FEC served a §6 notice with respect to those changes. Whether the strike conditions do justify the changes in whole or in part is admittedly a difficult question, but neither the presence of the question nor its difficulty changes the character of the dispute from "major" to "minor."[21] In short, the controversy is not over what the bargaining contract now permits as a matter of contract construction. The dispute is over the steps FEC can take

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[20] There is no merit to the contention of the FEC that the services of the Mediation Board were not properly invoked because FEC did not receive notice of the invocation within ten days. The Act merely requires that the services be invoked within ten days, as was done here.

[21] The fact that the Union Shop and 1949 agreements are still legally "existing" does not convert this into a "minor dispute." Agreements in the railroad industry do not cease to be effective until they are changed in accordance with the Railway Labor Act. As the United States observes, this emphasis on the " 'existence of the agreements' is thus a non sequitur."

to extricate itself from the consequences of a strike or other refusal by BRT to supply manpower.

Second, it is equally clear that if this were the ordinary situation of a Carrier not faced with "strike conditions,"[22] the institution of wholesale changes of the sort here involved would be enjoinable by the District Court pending exhaustion of the procedures of the Act. E.g., *Manning v. American Airlines*, 2 Cir., 1964, 329 F.2d 32; *R.R. Yardmasters v. Pennsylvania R.R.*, 3 Cir., 1955, 224 F.2d 226; *Railway Employees' Co-op v. Atlanta B. & C.R.R.*, D.Ga., 1938, 22 F.Supp. 510; *Chicago & W.I.R.R. v. Brotherhood of Ry. & S.S. Clerks*, N.D.Ill., 1963, 221 F.Supp. 561; *Monon v. Brotherhood of R.R. Trainmen*, N.D.Ill., 1963, 215 F.Supp. 430.[23] The rationale of these decisions is a simple one. Under the structure of the Act, changes "in agreements affecting rates of pay, rules, or working conditions * * *" may be instituted unilaterally

[22]We do not find it necessary to resolve the controversy waged both in the District Court and here as to whether the BRT was actually "on strike" from January 23, 1963, to the date of hearing in the District Court. Although the BRT was formally on strike for only two short periods during that time, it is uncontradicted that its members honored the picket lines of the non-operating Organizations and did not work and would not until the non-operating strike was terminated. For the purposes of this decision, whatever this might be called we hold that FEC was faced with "strike conditions" from the refusal of BRT to perform essential work.

[23]We thus agree with the position of the United States as amicus curiae that the Norris LaGuardia Act, 20 USCA §101, does not bar enforcement of the mandate of the Railway Labor Act. Virginia Ry. v. System Federation, 1937, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; Graham v. Brotherhood of Firemen, 1949, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22; compare Textile Workers v. Lincoln Mills, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972; Telegraphers v. Chicago & N.W. Ry., 1960, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774. Today, as in 1930, the mandates of the Railway Labor Act are enforceable by injunctive decree. Texas & N.O.R.R. v. Railway Clerks, 1930, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034.

only after notice, negotiation and mediation (if requested) and action by the Presidential Emergency Board if convened under §10. In order to insure that the purpose manifested in the Act to provide for orderly settlement of "all disputes" not be frustrated, the status quo must be preserved pending the exhaustion of the statutory procedures. Bargaining is a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a §6 notice.

But that is precisely what FEC asserts it may do here. With formal negotiations in progress under the September 25, 1963, notice, the argument of FEC that the changes which all parties agree are substantially identical to those embodied in the notice are only temporary (for the duration of the strike) is plainly specious. Through the means of the "Conditions of Employment" which all must sign, it has in fact instituted rates of pay, rules and working conditions over which it is presently bargaining under the procedures of the Act. This it cannot do, and the fact that the changes in actual operations were instituted prior to the §6 notice can make no difference. In both *Manning v. American Airlines*, 2 Cir., 1964, 329 F.2d 32, and *Chicago & W.I.R.R. v. Brotherhood of Ry. & S.S. Clerks*, N.D.Ill., 1963, 221 F.Supp. 561, injunctions were issued against changes which had already been instituted prior to suit.

The strike conditions, however, do have relevance to the proper solution of the problem at hand. Opposed both

by the BRT and the United States, FEC urges that the collective bargaining agreement is wholly suspended during the strike and that any other holding will make it impossible to avail itself of its right to continue its business during the strike. It is clear that the suspension argument has no merit. The BRT is still the bargaining representative of all the employees in the crafts of trainmen and yardmen whether union members or not. *Steele v. L. & N.R.R.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. The employees of FEC are entitled to the benefit of the terms of the agreement, and the FEC may not supersede the agreement by individual contracts, whether consented to by the employees or not. *Telegraphers v. Ry. Express Agency*, 1944, 321 U.S. 342, 346, 64 S.Ct. 582, 88 L.Ed. 788.[24]

But the case does not turn on the question of suspension. Rather, it is a problem of what the law permits when the protagonists have exhausted all of the elaborate governmental machinery for the settlement of a dispute, and neither is willing to budge. That is the situation here. There is an actual strike against FEC by the non-operating Unions. The continuation of the strike by such employees is legal. So, too, is the effort of FEC to operate. But as a result of this strike, BRT declines to supply the

[24]This case adopted for the Railway Labor Act the classic statement of the rule first announced in J. I. Case Co. v. NLRB, 1944, 321 U.S. 332, 336, 64 S.Ct. 576, 88 L.Ed. 762:

"[H]owever engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits * * *."

craft workers as its contract calls for. So far as FEC's need for these crafts and BRT's failure to supply them, there is no requirement, or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiescence. At that juncture, what the Act recognizes is that each party is free lawfully to employ self-help. The Supreme Court in this very controversy made that plain. In its decision of March 4, 1963,[25] it stated:

> "* * * What is clear * * * is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute * * *."

See also, *Order of Railway Conductors v. L & N.R.R.*, 1964, ... F.2d .... [No. 20714, April 20, 1964].

Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration. *Cf. NLRB v. Radio & Television Broadcast Eng'rs, Local* 1212, 1961, 364 U.S. 573, 81 S.Ct. 330,5 L.Ed.2d 302. That the occasions for resort to this raw power will be rare under a system which hedges in disputes by elaborate negotiations, mediation and Presidential fact finding machinery, does not deny either the existence of the power, or the present policy determination that, awesome as is its prospect, it is the only way to perserve the last vestige of free contracts, freely made.

[25]Brotherhood of Locomotive Engineers v. B. & O.R.Co., 1963, 372 U.S. 284, 291, 83 S.Ct. 691, 9 L.Ed.2d 759.

Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.

To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate.

This policy is reflected, for example, under the National Labor Relations Act, by decisions such as *NLRB v. Mackay Radio & Telegraph Co.*, 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381; *NLRB v. Erie Resistor Corp.*, 1963, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed. 2d 308; and *Redwing Carriers, Inc.*, 1962, 137 NLRB 1545, affirmed sub nom. *Teamsters, Local No. 79 v. NLRB*, D.C.Cir., 1963, 325 F.2d 1011. The consequences of self-help are not necessarily confined to the period of strife. Thus, as *Mackay Radio* and *Erie Resistor* clearly held, an "employer may operate his plant during a strike and

at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. 221, at 232.

These principles are clearly applicable here. Indeed, the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay non-union replacements. As a corollary, BRT concedes that FEC has no obligation to fire any such replacement at least until union membership has been declined by him.

But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers. Some of the practices followed by FEC indicate the nature of the problem and this limitation on self-help. Thus, for example, it is uncontradicted on this record that in order to earn pay for eight hours work, employees must now be on duty for eight and one-half hours (30 minutes for lunch, whereas under the 1949 agreement, eight hours pay was earned by seven hours and 40 minutes work (20 minutes for lunch), or a total of eight hours on-duty time. Likewise, many jobs have been reclassified to six-day rather than five-day,

thus avoiding payment of overtime. the practice apparently being to pay overtime only when an employee works a greater number of days than his job description calls for. The duties of switchmen and other yard employees have also been materially changed.

Although we do not here decide what changes may be reasonably necessary in light of the strike conditions, we hold that in a situation of this sort, it falls to the lot of the District Judge to pass on which changes are in fact necessary in order for FEC to continue to operate. Without placing it in terms of burden of proof and the like, we think it clear that in order for the District Judge to allow FEC to escape the ban on institution of changes pending exhaustion of the statutory procedures recognized by the decisions,[26] he must be convinced that in order to make a meaningful reality of FEC's right to continue to operate, the changes are reasonably necessary. While this appears to move the Judge from the firing line, *Townsend v. Sain*, 1963, 372 U.S. 293, 319, 83 S.Ct. 745, 9 L.Ed.2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC has done or proposes to do.

Finally, one last matter must be disposed of. The District Court held that the notice of September 25, 1963, superseded the prior November 2, 1959, notice. We think there is nothing either in the timing or intrinsic content of the September 25 notice in relation to the November 1959 notice, or in *Brotherhood of Locomotive Fire & Eng. v. Southern Ry.*, D.D.C., 1963, 217 F.Supp. 58, urged

[26]See cases cited in text accompanying note 23, supra.

forcefully by BRT and cited by the District Judge to support this view.[27] The parties bargained about each of the notices separately, though both were simultaneously pending for a period of time. Furthermore it is apparent that the Carriers and Organizations as a matter of practice treat each notice independently. *Monon R.R. v. Brotherhood of Railroad Trainmen*, N.D.Ill., 1963, 215 F.Supp. 430; *Pullman Co v. Order of Ry. Conductors*, 7 Cir., 1963, 316 F.2d 556. The November 2, 1959, notice was not superseded by the September 25, 1963, notice. *Order of Railway Conductors v. Louisville & Nashville R.R.*, 1964, . . . F.2d . . . [No. 20,714, April 20, 1964].

We restate. The FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963,[28] and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to

[27]The decision of the same Court in United States v. Florida East Coast Ry., M.D.Fla., 1964, . . . F.Supp. . . . [55 LRRM 2798], is not to the contrary. That case represents legitimate concern for the maintenance of the status quo pending the expiration of Public Law 88-108.

[28]We need not here decide whether under applicable precedent, the FEC's insistence on the presence of a reporter at the Monson Hotel bargaining session constituted a refusal to bargain. It is clear that until the Mediation Board disposes of this matter, FEC must comply with the Union Shop agreement.

effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire.

AFFIRMED IN PART.

REVERSED AND REMANDED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

D. C. Docket No. 64-40-Civil-J

FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,

Appellant,

versus

BROTHERHOOD OF RAILROAD TRAINMEN,
AFL-CIO,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, Chief Judge, BROWN Circuit Judge, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court; and that this cause be, and it is hereby remanded to the said District Court for further proceedings in accordance with said opinion.

It is further ordered and adjudged that the appellant, Florida East Coast Railway Company, a corporation, be condemned to pay one-half of the costs of this cause in this Court; and appellee, Brotherhood of Railroad Trainmen, AFL-CIO, be condemned to pay one-half of said costs, for all of which execution may be issued out of the said District Court.

August 18, 1964
Court Costs:
Issued as Mandate: SEP 11 1964
Docketing cause, etc . . . $25.00

APPENDIX C

PUBLIC LAW 88-108
88th Congress, S. J. Res. 102
August 28, 1963

JOINT RESOLUTION

To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are

essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action here-

tofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored."

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

SEC. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the

papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

SEC. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award

shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

SEC. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

SEC. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

SEC. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

SEC. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

SEC. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

LEGISLATIVE HISTORY:
HOUSE REPORT No. 713 accompanying H. J. Res. 665 (Comm. on Interstate and Foreign Commerce).
SENATE REPORT No. 459 (Comm. on Commerce).
CONGRESSIONAL RECORD, Vol. 109 (1963):
Aug. 26: Considered in Senate.
Aug. 27: Considered and passed Senate.
Aug. 28: Considered and passed House in lieu of H. J. Res. 665.

APPENDIX D

RAILWAY LABOR ACT
45 U.S.C. 151 - 163

Section 2, First (45 U.S.C. 152, First):

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh (45 U.S.C. 152, Seventh):

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 2, Tenth (45 U.S.C. 152, Tenth):

> "Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the car-

rier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Section 5, First (45 U.S.C. 155, First):

"First. The parties, or either party, to a dispute between an employee or group of employees

and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period

the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 5, Third (e) (45 U.S.C. 155, Third (e)):

"(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

Section 6 (45 U.S.C. 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of

an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

Section 10 (45 U.S.C. 160):

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to in-

vestigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. May 20, 1926, c. 347, § 10, 44 Stat. 586; June 21, 1934, c. 691, § 7, 48 Stat. 1197."

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JOHN F. DAVIS, CLERK

No. 691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILROAD TRAINMEN, AFL-CIO,
Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1964

No. 691

BROTHERHOOD OF RAILROAD TRAINMEN, AFL-CIO,
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FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 336 F. 2d 172 and is appended to the Petition herein as Appendix A (hereinafter referred to as Ptn. App. A). The judgment of the Court of Appeals is appended to the Petition herein as Appendix B. The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District

of Florida are printed in the Joint Appendix used in the Court below, pages 13-19, and the preliminary injunction which was appealed by Respondent to the Court of Appeals appears at pages 19-20 of the Joint Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, page 2.

QUESTIONS PRESENTED*

1. Whether in the circumstances of this case a railroad which served the November 2, 1959, notices involved in *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), where the dispute involving those notices was wholly unresolved, was entitled to place rules embodied in such notices into effect as to Petitioner on February 25, 1964 after all the procedures of the Railway Labor Act had been exhausted and after the suspension of said rules changes required by Public Law 88-108 had expired.

2. Whether the decision by the Court below, that in the future a railroad attempting to operate under strike conditions might, where reasonably necessary

---

* In the event a writ of certiorari is granted, Respondent reserves the right to argue as it did in the Court below that under the conditions existing it was justified in operating under the working conditions it utilized, that it was not bound by any agreement with the Petitioner or by any requirements of Section 6 of the Railway Labor Act inasmuch as Petitioner refused to supply manpower with which to operate and Respondent had been compelled to cease operations, that any complaint that the agreement with Petitioner is not being complied with is within the exclusive jurisdiction of the National Railroad Adjustment Board, and that Petitioner's action in the District Court was barred by the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (47 Stat. 70 *et seq.*).

to the continuance of operations and under the supervision of the courts, temporarily alter the rules governing work conditions embodied in agreements with the Petitioner, should be reviewed where no such changes have been approved by the Courts below or are before this Court.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (45 U.S.C. § 151, *et seq.* 44 Stat. 577, *et seq.*) and P.L. 88-108 (77 Stat. 129) are set forth in the Petition, pages 4-7, and Appendices C and D.

STATEMENT OF CASE

The Court is respectfully referred to the chronology of events leading up to the decision of the Court below contained in the Opinion (336 F. 2d 172 at pp. 175-78; Ptn. App. A, pp. 2-10). The statement of the case in the Petition is not in accordance with these facts and, accordingly, is defective. The relevant facts upon which this case must be judged are summarized as follows:

1. Florida East Coast Railway Company (hereinafter FEC or Respondent), along with other Class I carriers in the United States, on November 2, 1959 issued notices pursuant to Section 6 of the Railway Labor Act to its operating organizations including the Brotherhood of Railroad Trainmen (hereinafter BRT or Petitioner), the Petitioner herein. These notices (R. 68-71)[1] and the accompanying proposals modify the 1949 Collective Bargaining Agreement between BRT and FEC.

---

[1] "R" references are to the printed Joint Appendix, used in the Court below, nine copies of which have been filed with this Court.

2. While litigation in respect to the November 2, 1959 rules changes was in progress in *Locomotive Engineers* v. *B. & O. R. Co., supra* (and before the changes could properly be put into effect) eleven labor organizations representing non-operating employees of FEC struck on January 23, 1963 over a wage demand as to which the procedures of the Railway Labor Act had been exhausted. Although the BRT did not formally go out on strike at that time, its members honored the striking unions' picket lines and did not report for work. Consequently, FEC ceased operations.

3. Shortly thereafter, on February 3, 1963, FEC resumed operations utilizing supervisory personnel and later replacement workers, and in the circumstances of the strike, conditions of employment of these personnel necessarily differed from those set forth in pre-existing agreements between FEC and its labor organizations, specifically conditions provided in the 1949 Collective Bargaining Agreement with BRT.

4. Following the decision of this Court in *Locomotive Engineers* v. *B. & O. R. Co., supra,* in which this Court held, *inter alia,* that all statutory procedures in relation to the November 2, 1959 notices had been exhausted and that the carriers placing the rules changes into effect would not violate the Railway Labor Act by doing so, subject only to the invocation of a Section 10 Emergency Board, and following the expiration of P.L. 88-108, which had prohibited making certain of the November 2, 1959 rules changes effective, FEC on February 24, 1964 issued a notice which placed the November 2, 1959 rules into effect as of February 25, 1964 (R. 98-9) with certain exceptions as to which there is no controversy material here.

5. On the same day (R. 2-10), BRT sought an injunction against FEC making any changes in the rates of pay, rules, working conditions, etc. prescribed by the 1949 Agreement. The injunction as formalized on March 2, 1964 (R. 19-20) restrained FEC from operating under any terms except those embodied in the 1949 Agreement between FEC and BRT, thus precluding FEC from placing into effect the November 2, 1959 rules changes. The injunction was stayed on March 17, 1964 by the Court of Appeals and this stay was continued in effect pending the District Court's consideration of the nature and scope of the orders to be issued consistent with the Court's Opinion. Under the stay by the Court of Appeals of the District Court's injunction, the November 2, 1959 rules remained fully effective and FEC has operated under them since they went into effect.

6. The Court of Appeals held: (a) that the District Court had erroneously restrained FEC from placing the November 2, 1959 rules into effect and (b) that if *in the future*, by reason of strike conditions continuing to exist it was necessary to alter such rules in order to implement the undisputed right of FEC to continue to operate, this might be done under the direct and continuing supervision of the court.

BRT has completely clouded the issue in this case by insisting that the November 2, 1959 rules "were never put into actual effect or operation" (Ptn. p. 12) and by implying that the Court below sanctioned FEC's prior operation under rates of pay, rules and working conditions allegedly unilaterally imposed by FEC without compliance with the Railway Labor Act. Petitioner's questions presented are based entirely on

these assumptions. But these questions simply are not presented in this litigation.

The issue before the Courts below and before this Court is not whether the FEC acted erroneously at some time prior to the decision of the Court of Appeals. Rather, *the issue is whether FEC was entitled to place into effect and operate under the November 2, 1959 rules.* This was what BRT sought to enjoin when FEC, upon the expiration of P.L. 88-108, gave notice that the 1959 rules were being put into effect.

The Court of Appeals held that FEC was required to operate under the 1949 Agreement with BRT, except that it was entitled to place the 1959 rules changes into effect on February 25, 1964, as it did, and that FEC could not unilaterally impose different rules than those contained in the 1949 Agreement, as amended by the 1959 rules changes, without exhausting the Railway Labor Act procedures. The Court held, and this is clearly the fact, that nothing FEC had done, including the issuance of a notice on September 25, 1963 embodying certain of the conditions of employment established during FEC's "self help" period of operations, superseded the prior November 2, 1959 notice and that, in accordance with the terms of the notice of February 24, 1964 by which the 1959 rules changes were made effective (R. 98-9), negotiations concerning the September 25, 1963 proposals must continue.[2] Thus, FEC was held not entitled to place into effect, without first exhausting Railway Labor Act procedures, rules changes contained in FEC's notices of

[2] The February 24, 1964 Notice stated that the placing of the 1959 rules changes into effect ". . . in no way changes or modifies the Section 6 Notice of September 25, 1963, with respect to which negotiations are still proceeding with your Organization." (R. 99).

July 31, 1963 and September 25, 1963 relating respectively to the abolition of the union shop and the adoption of certain conditions of employment. Although it has reserved its position herein, FEC has not contested the decision of the Court below and is complying with it.

This is not a suit for damages or for criminal violation of the Railway Labor Act. Petitioner's repeated charges that FEC acted improperly during the period from February 3, 1963 to the determination of this suit by the Courts below must therefore be relegated to the category of smear tactics, for these charges have no bearing whatsoever upon the issue presented.

ARGUMENT AND REASONS FOR DENIAL OF THE WRIT

The Petition for Writ of Certiorari should be denied in this case.

(1) The Decision in the Court of Appeals Does Not Involve An Important Unsettled Question of Federal Law

The basic holding of the Court of Appeals that the 1959 rules were properly placed into effect by Respondent is clearly correct and involves only the application of *Locomotive Engineers* v. *B. & O. R. Co., supra,* to the facts of the instant case. This Court held there that all statutory procedures in relation to the November 2, 1959 notices had been exhausted and that placing the rules changes into effect would not violate the Railway Labor Act. Carriers were free to resort to self-help in adjusting the dispute over the 1959 rules. BRT sought in the District Court to enjoin FEC from placing the 1959 rules into effect and the Court below in denying this relief, simply applied this Court's ruling in the *Locomotive Engineers* case.

BRT seeks to avoid the impact of this Court's decision in the *Locomotive Engineers* case by arguing at length (Ptn. pp. 15-20) that the Court of Appeals decided an important unsettled question of Federal law, to-wit, the question whether a railroad, when faced with strike conditions, may adopt changes in rates of pay, rules and working conditions necessary to its right to operate under such conditions. The crucial determination of the Court of Appeals, however, was the holding that FEC had properly placed into effect the rules changes contained in its November 2, 1959 Notice and that "The FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959 notice . . . . ." (Ptn. App. A, p. 19).

Whether or not past actions of FEC prior to February 25, 1964, by way of accommodation to emergency strike conditions were or were not justified under the Railway Labor Act is irrelevant, if the Court of Appeals was correct in its determination of the rules under which FEC may operate henceforth—the 1959 rules. FEC's placing the 1959 rules into effect upon the expiration of P.L. 88-108 was clearly sanctioned by this Court in *Locomotive Engineers* v. *B. & O. R. Co., supra.* The statement by Petitioner that

> ". . . the November 2, 1959 Notice proposals were never put into actual effect or operation. And the rates of pay, rules and working conditions actually in effect are the same as those 'proposed' in the September 25, 1963 Notice . . . ." (Ptn. p. 12)

is untrue. FEC placed the 1959 rules into *actual operation* on the railroad on February 25, 1964 (R. 98-9, 137, 142-44, 184). Petitioner's mis-statement of the

"conditions actually in effect" (for which there is no Record support) should not be allowed to obscure the fact that the Court of Appeals permitted FEC to operate under the 1959 rules and *that is actually what FEC has been doing since shortly after February 25, 1964.*

Indisputably, FEC could not have placed the 1959 rules into effect before it did. As the facts set forth in the opinion below clearly demonstrate, except for the period July 10, 1963 to August 28, 1963 (during which the 1959 rules were placed into effect by FEC),[3] FEC was legally precluded from placing them into effect prior to February 25, 1964. BRT's repeated assertion that the 1959 rules were never placed in actual operation is accordingly inaccurate.

Next, Petitioner seeks to avoid the controlling significance of *Locomotive Engineers* v. *B. & O. R. Co.,* (Ptn. pp. 22-4) by attempting to show that FEC "superseded" the November 2, 1959 Notice or forfeited the right to place it into effect by issuing a different Section 6 Notice on September 25, 1963, or that somehow FEC "waived" its right to put into effect its 1959 rules by not complying with injunctions issued in other cases. *United States* v. *Florida East Coast Railway,* 221 F. Supp. 325 (D.D.C. 1963) and *United States* v. *Florida East Coast Railway,* — F. Supp. —, 55 LRRM 2798 (M.D. Fla. 1963).

The November 2, 1959 Notice was not "superseded" because, as the Court of Appeals found as a matter of

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[3] During this period FEC could not actually operate completely under the 1959 rules since as the Court below noted (Ptn. App. A, p. 6), "the BRT was still refusing to cross the picket lines" and FEC was forced to operate almost wholly with supervisory personnel.

fact (see n. 2 *supra*), it was not intended to be superseded by the September 25, 1963 Notice.

> "The parties bargained about each of the notices separately, though both were simultaneously pending for a period of time. Furthermore, it is apparent that the Carriers and Organizations as a matter of practice treat each notice independently. . . . The November 2, 1959, notice was not superseded by the September 25, 1963, notice." (Ptn. App. A, p. 19)

It is established law that where the procedures of the Act have been exhausted with regard to one Section 6 Notice, the giving of a new Section 6 Notice will not prevent the putting into effect of the rules changes handled to a conclusion under the Act. *Monon R. R.* v. *Brotherhood of Railroad Trainmen,* 215 F. Supp. 430 (N. D. Ill. 1963); *Pullman Company* v. *Order of Railway Conductors,* 316 F. 2d 556 (7th Cir. 1963); *Order of Railway Conductors* v. *L. & N. R. R.,* 331 F. 2d 368 (5th Cir. 1964); *Pan Am World Airways* v. *Flight Engineers,* 306 F. 2d 840 (2nd Cir. 1962); *Flight Engineers Int. Ass'n, EAL Chap* v. *Eastern Air Lines,* 208 F. Supp. 182, 189-91 (S.D.N.Y. 1962), *affirmed,* 307 F. 2d 510 (2d Cir. 1962), *cert. den.,* 372 U.S. 945 (1963).

The contention of waiver or forfeiture based on FEC's alleged non-compliance with injunctions is totally specious, so much so that the Court of Appeals did not ever consider it worthy of mention. Neither District Court case cited by Petitioner involved FEC's right to place the 1959 rules into effect following the expiration of P.L. 88-108. The first injunction, issued by the District Court in the District of Columbia, merely involved the requirement that FEC defer placing into effect the 1959 rules until thirty days after the

rendition of the report of the Emergency Board 154. FEC fully complied with that injunction, withdrawing the 1959 rules which it had sought to place into effect. The second case merely involved the question whether an attempt by FEC to place certain rules changes into effect as to three operating unions other than BRT was barred by the provisions of P.L. 88-108. The Court held that some of the changes were barred, others were not, and FEC complied fully with the terms of the injunction.

Petitioner urges that these injunctions required FEC to go back to operation under the 1949 Collective Bargaining Agreement. As a reading of both opinions will demonstrate, this is erroneous. In neither instance did the Court require FEC to change its manner of operations *under strike conditions*. And, even if those injunctions had imposed such a requirement during some prior period (which they did not), such a requirement would be immaterial following the expiration of P.L. 88-108—the time at issue here. Finally, the United States, which sought and obtained the two injunctions referred to, never brought contempt proceedings against FEC, nor so far as FEC is aware were such proceedings ever contemplated inasmuch as FEC obeyed the injunctions to the letter.

(2) The Decision of the Court of Appeals That, in the Future, Where Reasonably Necessary to Continue Operations, Respondent May Under Court Supervision Alter Employment Conditions Raises Only a Hypothetical Question and Is Clearly Correct

As has been pointed out, this facet of the Court of Appeals holding is *not* an approval of FEC's past practices but an allowance for future contingencies only. The Court below clearly required FEC to op-

erate only under the 1949 Agreement as amended by the 1959 rules changes if possible—and this is being done now. In recognition of the undisputed right of FEC to try to remain in operation—to resort to self-help as this Court has phrased it—the Court of Appeals merely pointed out that certain adjustments in working conditions as prescribed in the 1949 and 1959 rules *might* be required in order to meet emergency conditions. This was conceded by Petitioner in the Court below:

> ". . . Indeed, the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay non-union replacements. As a corollary, BRT concedes that FEC has no obligation to fire any such replacement at least until union membership has been declined by him." (Ptn. App. p. 17)

It is, of course, possible that BRT or other labor organizations *might* sometime in the future succeed in depriving FEC of all employees, and that the Railroad *might* then find it necessary again to adopt emergency procedures to enable it to operate under these conditions. But it is apparent that these are possibilities, not the actual situation before the Court. Thus, the attempt to secure review of this feature of the Court of Appeals holding raises at best an hypothetical question on which at the present time there is no record at all upon which this Court could make any determination. Moreover, as FEC is now operating

strictly under the 1959 rules, questions based upon prior conduct at variance with those rules are moot.[4]

Apart from the moot or hypothetical, *in futuro* nature of the questions sought to be presented in this regard, it is abundantly clear that no substantial, important or novel question is presented. On the merits, the Court of Appeals was clearly correct in holding that FEC is

> ". . . free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under strike conditions." (Ptn. App. A, pp. 19-20)

This holding by the Court of Appeals, in spite of the protestations of Petitioner to the contrary, is neither novel nor startling. It follows logically from this Court's decision in *Locomotive Engineers* v. *B. & O. R. Co., supra,* which held that when all procedures under the Act have been exhausted the parties are free to resort to self-help, and from this Court's decisions in such cases as *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938) and *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221 (1963), holding that a corollary of the right to strike in a system lacking compulsory arbitration is management's "right to operate, or at least the right to try to operate." (Ptn. App., A, p.

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[4] See *California* v. *San Pablo & Tulare R.R.,* 149 U.S. 308, 314 (1893), where a cause of action was extinguished by offer to pay sums due. Justice Gray said: " . . the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue before it." See also, *United States* v. *Alaska S.S. Co.,* 253 U.S. 113 (1920); *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947).

16). Any conclusion other than that reached by the Court below would make a mockery of this right. See *Flight Engineers Int. Ass'n, EAL Chap.* v. *Eastern Air Lines, supra.*

Petitioner counters with the argument (not made in the Court below) that because the Railway Labor Act provides criminal penalties for violations of its provisions, the Court of Appeals' decision incorrectly permits violations of a criminal statute on the basis of economic necessity (Ptn. pp. 18-20). This argument is a non sequitur, for the criminal sanctions provided by the Railway Labor Act are entirely irrelevant to the instant case. No prosecution for criminal violations of the Act has been brought against FEC at any time by the United States. Petitioner seeks an injunction, not conviction of the Railroad under the criminal sanctions provided by the statute.

If the Court of Appeals is wrong in holding that a railroad faced with strike conditions has a right to operate even if deprived of a labor supply sufficient to permit adherence to pre-existing labor agreements, then there will be no corollary to the right to strike. Or rather, the corollary to labor's right to strike will be management's duty to go out of business. To state the proposition is to refute it. As the Court of Appeals correctly pointed out,

> ". . . the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration." (Ptn. App. A, p. 15)

The Petitioner contends, in effect, that before a railroad is entitled to meet an emergency cessation of operations and to effectuate its undisputed right to try to operate it must, with respect to each proposed

temporary change necessitated by strike conditions, give notice, bargain and otherwise exhaust the procedures under the Railway Labor Act. Obviously a labor organization will never agree with the emergency conditions instituted by a railroad under strike conditions. Nevertheless under Petitioner's theory, a railroad out of operation must go through all of the Railway Labor Act procedures, including mediation, seeking the consent to emergency working conditions of the very people who created the emergency by refusing to work in the first place! All will agree that in the circumstances actually existing in this case, such a course of action would not only have been futile but absurd. The Railway Labor Act was not designed to meet or intended to cover the situation involved in such a case as this, where operations had ceased. In contrast, the Railway Labor Act and its procedures are designed to maintain continuance of operations and of work while disputes are being negotiated and mediated. *Locomotive Engineers* v. *B. & O. R. Co.*, *supra*, 372 U.S. at 289-90; *Terminal Assoc.* v. *Trainmen*, 318 U.S. 1, 6-7 (1943); *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 723-28, (1945).

Consequently, it is wholly inaccurate to accuse the Court of Appeals of having written an exception into the Railway Labor Act. What the Court of Appeals did was to resolve judicially a situation in which the Railway Labor Act is inapplicable and in which its procedures could never be successfully invoked.

Section 2, First, of the Railway Labor Act (45 U.S.C. § 152, First) sets forth the purpose of the Act as being

> "... to avoid any interruption to commerce or to the operation of any carrier growing out of any

> dispute between the carriers and the employees thereof."

All of the procedures specified by the Act are dedicated to keeping carriers in operation while disputes are being negotiated and mediated. As this Court said in *Locomotive Engineers* v. *B. & O. R. Co., supra,* 372 U.S. at 290,

> "'. . . The federal interest that is fostered [by the Act] is to see that disagreement about conditions does not reach the point of interfering with interstate commerce'"

The provisions of the Railway Labor Act are designed for this purpose and do not in any way specify procedures to be followed where a railroad faced with strike conditions has ceased to operate. No provision of the Railway Labor Act can be found which even hints at procedures applicable once a strike has brought a railroad to the point at which it must adopt emergency rules or else go out of business. Shy of a statutory requirement of compulsory arbitration, there is no rational approach to this problem other than that taken by the Court of Appeals.

(3) The Decision of the Court of Appeals Is Not in Conflict With the Decision of Any Other Court of Appeals

There is admittedly no conflict between decisions of the Courts of Appeals in respect to the holdings of the Court below that FEC was free to operate under the 1959 rules, and that the railroad might apply to the Court for permission to adopt employment measures necessary to effectuate its right to operate under strike conditions. Petitioner therefore attempts to manufacture a conflict among the Circuits on the issue of

the proper scope of review by Courts of Appeals of preliminary injunctions issued by District Courts (Ptn. pp. 20-22). The point is not well taken.

Petitioner concedes as it must (Ptn. p. 20) "... that in labor controversies, preliminary injunctions have a way of cutting to the merits and ending the entire controversy." So also here, the so-called "preliminary injunction" (R. 19) definitively determined FEC's and BRT's mutual rights and duties in respect to placing the 1959 and other rules into effect. The District Court found, *inter alia,* that FEC

> "... has not exhausted all the procedures under the Railway Labor Act for making a change in the status quo, and is not entitled to institute the changes proposed in ... the November 2, 1959 Notice ...." (R. 18)

This injunction was granted following a full hearing (R. 13-14, 111-218) going into all of the substantial issues raised by the complaint and FEC's Motion for Reconsideration or Modification and Motion for Stay (R. 20-24) was also argued fully (R. 219-269). These facts completely distinguish this case from all those which Petitioner cites as being in conflict with the action of the Court of Appeals here. Petitioner has not suggested that further proceedings would have or could have been had, nor that further evidence would have or could have altered the legal and factual situation which was completely presented to the District Court. As the Court pointed out in *Wooten* v. *Ohler,* 303 F. 2d 759 at 762 (5th Cir. 1962), cited by Petitioner,

> "... several contentions advanced are of such a nature that if they are demonstrated now to be

> correct to a substantial certainty, there would be no point in a trial on the final merits since no likely trial developments could overcome them."

The situation in the instant case simply does not admit of the necessity of further hearings nor is there any basis whatever for supposing that the normal rule of restricted review has any application to this case.

Petitioner seeks this Court's intervention in the solution of "this unending, tragic labor controversy" (Ptn. p. 24). Stripped of its verbiage Petitioner's rhetoric merely signifies dissatisfaction with the determination of the Court below concerning future relations of the parties pending final settlement of the dispute between them. It cannot be forgotten that it was the Petitioner who refused to supply *on any terms* manpower essential to FEC's maintenance of operations, and that both human tragedy and grave economic losses to the shippers of Florida stemmed from the unions' attempts to keep FEC from operating. The charge that Respondent acted in defiance of the law in its efforts to stay in operation (Ptn. p. 24) seems ill considered in the light of the public knowledge that FEC trains were bombed, workers injured and attacked and their property damaged—all in flagrant violation of the law—by members of the Petitioner and other unions in their efforts to prevent FEC from operating (R. 43-44, 139, 199). While the solution of the Court below was not wholly acceptable to either party it was a solution which attempted to reconcile and harmonize the positions of both and which in fact has stabilized the situation. Accordingly, this Court's intervention now would be neither wise nor desirable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

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Certificate of Service

I hereby certify that a true copy of the foregoing Brief for Respondent in Opposition was served this 16 day of November, 1964, upon Neal Rutledge. Esquire, and Allan Milledge, Esquire, 601 Flagler Federal Building, 111 N. E. First Street, Miami, Florida 33132, by depositing a copy of same addressed to each in the United States mail with sufficient air mail postage, prepaid.

GEORGE B. MICKUM, III